BRIEF IN SUPPORT OF ANSWER

The Motion to Supplement Record is in form simply a request to have included in the Record certain information in regard to the current earnings and current cash position of the Debtor's estate. We have no objection to having this Court take judicial notice of the fact that the Debtor, in common with all other railroads, is at the present time enjoying large earnings as a result of war conditions and by reason of such earnings has accumulated substantial amounts of cash, so long as it also takes judicial notice of the obviously temporary nature of such earnings.

The real purpose of the Motion, however, is to persuade this Court to take the position that this Plan of Reorganization should be scrapped, not because of any error in the decisions which this Court has been asked to review, but because of the present prosperity of the Debtor and other railroads due to war conditions.

The petitions for certiorari were filed to ask this Court to review the correctness of the Circuit Court's decrees entered February 9, 1942 (Tr. 5816 ff.) affirming the action taken by the District Court in approving and confirming the Plan. The Motion to Supplement Record suggests the novel principle of law that the correctness of those decrees of the Circuit Court should be determined, not on the basis of the record before that Court and the facts as they existed at the date of those decrees, but on the basis of events subsequent to the date of entry of those decrees.

The Circuit Court of Appeals was well aware of the current war prosperity of the Debtor at the time of the entry of its decrees. In its opinion the Court said (Tr. 5804):

> "This radical change (for the better) in the past year can not and should not be ignored. * * * It is something we can, and should, and do, take judicial notice of. It is, we believe, temporary, and like a crop failure year, in the Northwest—which this Debtor serves—not to be taken too seriously when viewing the long future of this railroad. In making this statement we are aided by the experiences of railroads during and after the last war."

Counsel for the Debtor rely primarily on this Court's decision in *Atchison, T. & S. F. R. Co.* v. *United States,* 284 U. S. 248 (1932), and other cases in which this Court considered the effect of economic changes on the reasonableness of rates fixed without regard to such changes. There is no analogy between those cases and the present case. In the *Atchison* case the Interstate Commerce Commission, in a proceeding to lower rates on grain and other farm products, had refused to permit a rehearing for the introduction of evidence of a drastic nationwide decline in railroad earnings which had occurred after the close of the hearings before the Commission. This Court held that the Commission had acted improperly in refusing to receive the additional evidence tendered.

There are two basic distinctions between the situation in the present case and that presented to this Court in the *Atchison* case. In the *Atchison* case this Court's problem was whether rates fixed on the basis of relatively high railroad earnings could be permitted to stand when there had been a complete change in the level of earnings. Since rates must be fixed so as to yield reasonable compensation, they are necessarily subject to change from time to time as a result of shifting economic conditions. They are not fixed

for all time on the basis of estimated normal earning power. But the capitalization of a reorganized railroad must necessarily be so fixed. This basic distinction makes the *Atchison* case (and the other rate cases cited in the Motion) entirely inapplicable to the questions now before this Court.

Moreover, the ground for reversal in the *Atchison* case was that the Interstate Commerce Commission, the basic fact finding body, had itself refused to receive evidence of changed conditions, although seasonably requested to do so. No such question is here involved. It is not alleged, nor is it the fact, that either the Interstate Commerce Commission or the District Court refused to consider any evidence which it was asked to consider.

The Motion raises the basic question whether the time ever comes when a railroad reorganization can be consummated under the procedure described by Section 77 of the Bankruptcy Act. If it be true, as the Debtor would have this Court hold, that changed conditions (however temporary such changes may be) after the confirmation of a Plan by the District Court form a basis for sending the Plan back to the Interstate Commerce Commission for revision in the light of such temporary changes, the necessary result is that railroad reorganization proceedings, which in many cases have already dragged out for almost ten years, may well continue for another ten years. If this Plan should now be referred back to the Interstate Commerce Commission and if it should thereupon be revised, as the Debtor would have it revised, to increase capitalization on the basis of war earnings, it is entirely possible that by the time the revised plan has reached the stage of confirmation, after going through the elaborate machinery prescribed by Section 77 and after being subjected to the inter-

minable delays to which any plan can be subjected under that machinery by determined opponents, railroad earnings will again have sunk to so low a level that the revised plan would cease to be either fair or feasible. If the principle for which the Debtor contends were accepted by this Court a further revision of the Plan would then be requisite to shrink the capitalization to fit the then existing economic conditions. We are confident that this Court will not look with favor on any suggestion which contemplates an indefinite continuation of railroad reorganization proceedings.

Section 77 expressly provides (Section 77(f)) that, when a plan of reorganization has been duly confirmed by the District Court, the rights of the parties have been finally and definitely established subject only to the "right of judicial review." Certainly the phrase "right of judicial review" does not contemplate a change in those established rights as a result of conditions which may arise after the entry of the order of confirmation. Any other interpretation of Section 77 would, as pointed out above, make the completion of any reorganization impossible.

If this principle is sound, as we believe it to be, it would be obviously improper for this Court, if it should refuse to grant certiorari, to do so without prejudice to a petition to the District Court for payment of the debt to Reconstruction Finance Corporation. If such a petition were to be made for payment to the R. F. C. by way of prepayment of securities to be issued to R. F. C., under the Plan, it could be considered by the District Court without any action by this Court. But the Debtor contemplates that its petition, if granted, would necessarily completely disrupt the Plan and would require the writing of a new plan by the Commission and the repetition of all the elaborate pro-

cedure required by Section 77. The Debtor recognizes the improbability of any reversal by this Court of the decrees of the Circuit Court of Appeals and is attempting by this extraordinary device to postpone reorganization in the vague hope of securing some participation for the stockholders of the Debtor. It is obvious that the District Court can have no power to grant such a petition, since the rights of the parties are already fixed by the order confirming the Plan.

Efforts to disrupt pending reorganization plans by forcing the application of cash to the payment of indebtedness in such a way as to nullify such plans have become a popular device of representatives of stockholders seeking to delay the consummation of reorganization plans. We strongly urge that this Court, by prompt denial of the Motion in its entirety and by prompt action on the pending petitions for certiorari, show that delaying tactics of that nature will not be sanctioned by this Court. The public interest requires prompt railroad reorganizations. Rights of security holders must be protected, but the protection of such private rights is fully assured by the procedure prescribed by Section 77 and must not be extended to permit interminable litigation.

Respectfully submitted,

LEONARD D. ADKINS,
Attorney for Respondents
George W. Bovenizer, et al.,
15 Broad Street,
New York, N. Y.

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